Supreme Court, U.S.
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No. 71-479

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

Kathlene C. Mareno and Antonio Mareno,

Petitioners,

vs.

Westchester Rockland Newspapers, Inc.,
and Raymond Margles,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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Your petitioners, Antonio Mareno and Kathleen C. Mareno, pray that a writ of certiorari issue to revue the order and judgment of the Appellate Division of the Supreme Court of the State of New York, 2nd Judicial Department, rendered in these proceedings on October 5, 1970.

OPINION BELOW

The judgment of the Appellate Division, rendered without opinion, affirmed an order and judgment of the Supreme Court, Westchester County, dated June 30, 1969, rendered at Special Term (motion part), which summarily dismissed prior to trial the complaint in petitioners' defamation action brought against respondents publisher and local public official; and is *unofficially reported in 315 N.Y.S. 2d 819.* The opinion of the Special Term judge is unreported, and is the only written opinion in the case (App. A).

JURISDICTION

The Appellate Division's said judgment of affirmance, (App. B) dated October 5, 1970, is the judgment of an intermediate appellate court within the state's judicial system. Consequently, following the entry of an order of that court dated December 1, 1970, (App. C) denying leave to petitioners to reargue said appeal, your petitioners sought leave of the Court of Appeals, the state's highest appellate court, to appeal to it from the judgment of affirmance entered by the Appellate Division as aforesaid. By order dated July 7, 1971, (App. D) the Court of Appeals dismissed your petitioners' motion for leave to appeal upon the stated ground of 'untimeliness'.

For reasons to which petitioners will address themselves in this petition the aforementioned order of the Court of Appeals constitutes the 'final judgment' that the Appellate Division's said judgment of affirmance is the decision in the case of the highest court within the state in which a determination of the federal questions raised in the case could be had within the meaning of 28 U.S.C., section 1257, and this petition is made

within 90 days of the entry of said final judgment.

QUESTIONS PRESENTED

1. Was the dismissal of petitioners' motion for leave to appeal to the Court of Appeals made upon an adequate state ground which precludes review of the Appellate Division's determination of the underlying federal questions by a Writ of Certiorari?

2. Was the principle of the New York Times case properly applied to the evidence adduced on respondent publisher's pre-trial motion for summary judgment under the causes of action in libel?

3. Was Special Term's application of the principle of the New York Times case *sua sponte* to the causes of action in slander against respondent public official premature?

AUTHORITIES INVOLVED

Question No. 1 involves section 5513 (c) of the Civil Practice Law and Rules (McKinney's Cons. Laws of N.Y., Book 7 B, Section 5513 (c)) which states in relevant part:

> The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry ***.

Question No. 2 involves the first amendment freedom of press guarantee in the Constitution of the United States as applied to the states through the fourteenth amendment to said constitution.

The first amendment (Article I) states in relevant part:

> Congress shall make no law. . .abridging the freedom of speech, or of the press. . .

The fourteenth Amendment (Article XIV, Section I) states in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . .

Question No. 3 involves section 3212 (b) of the Civil Practice Law and Rules (McKinney's Cons. Laws of N.Y., Book 7 B, Section 3212 (b)) the pertinent part of which reads:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show * * * that the cause of action * * * has no merit. * * * If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

STATEMENT OF THE CASE *

THE FACTS–

On July 24, 1965, petitioners commenced a *taxpayers' action* with two other persons against the Town Board of the Town of Yorktown, seeking multiple relief, including a recovery *on behalf of the town* of some $355,000 illegally expended in 1964 by the board from town funds for the restoration of town highways torn up at the instance of an improvement district during the installation of a sewer system, said improvement district being obligated by law (Town Law, section 198-e, McKinney's Cons. Laws of N.Y., Book 61, Section 198-e) to restore said highways at *its* own expense (A10-19). Two days later, to wit, July 26, 1965, respondent publisher published the following news article concerning petitioners and others in its daily newspaper, The Reporter Dispatch (A55-56):

ANOTHER SUIT AGAINST ROADS FACES TOWN

YORKTOWN HEIGHTS —

The Yorktown Town Board was served with a personal suit in the amount of $350,000 over the weekend by Mr. and Mrs. Antonio Mareno and Mr. and Mrs. Livingston Coulter, *as private citizens of Yorktown.*

The suit charges that the capital improvement budgets of the last two years are in violation of the law, and seeks payment for the amount budgeted.

Raymond Margles, town attorney, labeled the suit "legal harassment of the worst kind." The town is authorized to appropriate money for capital improvement, he said, adding

*References are to the appellants' appendix used on the appeal to the Appellate Division.

"any one who has finished the first year in law school knows that."

Mr. Margles pointed out that the State Supreme Court had refused to upset an election set for Friday, which was challenged in a suit by Walter Graff of Shrub Oak.

In his decision last week, Justice John J. Dillon said the town's plans for the referendum were an "administrative decision" and as such could not be disturbed by the courts "except for illegality" or conduct which is plainly unreasonable.

Two of the plaintiffs in the suit, the Marenos, are members of the North End Republican Club in Yorktown which brought about a charge of "political inspiration" by Mr. Margles.

"The capital improvement budget was first approved by the previous Republican administration he said, "and no action was taken against them"

"The suit is motivated by the basest political motivation and is merely an attempt to embarrass Mr. Kibbe and the town board," he said.

"We had hoped the Supreme Court decision would end harrassment, but they are continuing with their contemptible action. I feel that this will cause the town to turn on them with revulsion," he (sic) concluded the town attorney. (Emphasis added.)

The last sentence of the above news article had reference to a bond issue referendum (to finance the remainder of the contemplated highway restoration work scheduled for 1965) which was set to be held on Friday, July 30, 1965 – a referendum which petitioner Antonio Mareno had played a significant role in bringing about as a member of an *ad hoc* taxpayers' committee (A35,37,23-25). And two of the persons mentioned by name in said news article, namely, petitioner Antonio Mareno and Livingston T. Coulter, were then and still

are members of the bar of the State of New York (A32,40).

The instant defamation action arises from the publication of the said news article of July 26th, 1965. Although the responsive pleadings were not furnished to the court at Special Term by respondent publisher in its moving papers, and as a consequence do not comprise any part of the record below, both respondents did in fact allege in their respective answers to the complaint in this action that the defamatory words were uttered without knowledge of their falsity and without a reckless disregard as to the truth or falsity of such utterances. On this state of the pleadings respondent publisher moved at special term for a dismissal of the first and third causes of action against it and for summary judgment pursuant to CPLR 3211(a)7 and (c), relying, among other things, upon affidavits of its editor, its news reporter, and the respondent public official who was interviewed over the telephone by said reporter, in disclaiming knowledge of falsity in the news article and reckless disregard as to its truth or falsity. Respondent public official made no motions addressed to the second and fourth causes of action against him at all.

With respect to the characterization of the nature of the lawsuit brought by petitioners, respondent public official averred at Special Term that he told reporter Horgan "that the plaintiffs in this action were asking for $350,000.00 in damages against the Town Board members, *for the Town,* charging that previous capital improvement budgets of the Town had violated the law." (A7 - Emphasis added). But in her affidavit at Special Term reporter Horgan disputes this statement. She said respondent public official told her "In this conference, Mr. Margles told me that a lawsuit had been commenced against the members of the Town Board of the Town of Yorktown by Mr. and Mrs. Antonio Mareno and by Mr.and Mrs. Livingston Coulter, who were citizens of the Town. He said that in this

lawsuit, Mr. and Mrs. Mareno and Mr. and Mrs. Coulter were asking for $350,000.00 in damages against members of the Town Board personally. He said that, in the lawsuit, it was charged that previous capital improvement budgets of the Town had violated the law." (A26)

On the charge of legal harassment, respondent public official averred that he told reporter Horgan (A7):

> "I told YVETTE HORGAN, that *in my opinion,* the action was meritless and constituted legal harassment of the worst kind." (Emphasis added.)

But reporter Horgan averred that respondent public official said (A26):

> "Mr. Margles described the action in his own words, as 'legal harassment of the worst kind'."

On the charge of political motivation, respondent public official claimed he told Horgan (A8):

> "I also told YVETTE HORGAN that two of the plaintiffs in the action for damages against the members of the Town Board were members of the North End Republican Club in Yorktown, and that *I believed* that their action had political inspiration." (Emphasis added.)

And on the same subject said public official claimed he also told Horgan (A8):

> "I also said that *in my opinion,* the suit was motivated by the basest of political motives and was merely an attempt to embarass the Town Board and Mr. Kibbe." (Emphasis added.)

The Horgan affidavit at special term agrees that respondent public official did not identify to her the two plaintiffs he said had membership in the North End Republican Club (the July 26th news article identifies such person as the Marenos). But then Horgan said that Margles said categorically (A27):

"and he said that their lawsuit had 'political inspiration'."

Horgan also said that Margles stated categorically (A27):

"He said that 'the suit is motivated by the basest political motivation and is merely an attempt to embarass Mr. Kibbe and the Town Board'."

The record at Special Term also indicated that the practice of the respondent publisher was to edit material received for publication prior to publication (A23-25). Editor Bookman, referring in his affidavit to an earlier letter he received from petitioner Antonio Mareno, stated (A20):

"Subsequently, plaintiff Antonio Mareno wrote another letter to the Editor for publication, dated June 24, 1965, *the greater part of which* was published in "The Reporter Dispatch" shortly after said date. (Emphasis added.)

And on the subject of verification of information reporter Horgan stated in her affidavit (A27,28):

"Over a long period of time, as a reporter, I had obtained information from Mr. Margles about Town affairs for publication, and *I had always found such information correct and reliable.* (Emphasis added.)

Thus, Horgan also admits that information obtained from Mr.

Margles for publication in the past was, like information obtained by the paper from other sources, subject to verification. But in her pre-trial deposition Horgan testified (A50):

> Q Mrs. Horgan, prior to writing the article plaintiff's exhibit "I", for identification (libel of July 26th, 1965), did you make any attempt to interview or contact Mr. and Mrs. Coulter, or Mr. and Mrs. Mareno? A Not prior to writing this article.

Immediately following publication of the said news article of July 26th, 1965, petitioner Antonio Mareno wrote a letter to The Reporter Dispatch of the same date, explaining petitioners' actions in suing, describing the lawsuit as being a *taxpayers' action* in which petitioners stood to obtain no monetary gain, disclaiming any political motivation, pointing out that petitioner Kathlene C. Mareno was not a member of the North End Republican Club, and pointing out also that the town board was aware of the fact that suit was imminent (A53-54). However. respondent publisher's editor refused to publish petitioners' explanation of their actions which was induced by the libelous news article on July 26th. (A51).

The foregoing constitutes the essential evidence of 'actual malice' before the special term judge under respondent publisher's motion. In recapitulation, this evidence points to respondent publisher's endeavors to (1) prepare a news article for publication on the subject of petitioners' 'motivations' in bringing suit which bypasses contact with petitioners during the preparatory stage, (2) interpolate information furnished it by respondent public official on the subject and (3) 'gag' [1] petitioners prior to a taxpayers' referendum in the Town, thus

preventing petitioners from giving a seasonable explanation of their actions to the taxpayer-electorate, among other things.

SPECIAL TERM'S ROLE –

On respondent publisher's motion to dismiss the first and third causes of action petitioners relied upon the record evidence of interpolation and the gagging of petitioners, in responding to the 'actual malice' standard enunciated by this Court in *New York Times* v. *Sullivan,* 376 U.S. 254.(A51). However, the judge hearing the motion met this evidence by upstaging it, devoting the meat of his opinion, insofar as the libel causes were concerned, to circumstances in the case bearing upon petitioners' status as 'public figures'. (A63-64) And the dismissal of the libel causes was predicated upon the *New York Times* case. The judge then shifted abruptly in his opinion, perforce of CPLR 3212(b), to the slander causes concerning which no motion had been made or evidence had been presented,[2] finding here, in disposing of the issues adverse to petitioners, the voice to speak to the subject of 'actual malice' he lacked when addressing himself to the libel causes. (A64) This summary consideration and disposition of the slander causes by the Special Term judge deprived petitioners, among other things, of the opportunity to utilize evidence at hand to support the slander causes, including the pre-trial deposition of respondent public official taken at the same time as the depositions of reporter Horgan and petitioner Antonio Mareno, but which was not before the court on the motion, and as such, is not part of the record upon which that court acted.

APPELLATE DIVISION'S ROLE –

On the appeal petitioners pressed their contentions with respect to the presence of 'actual malice' in the record at Special Term, and also objected to Special Term's consideration and disposition of the slander causes *sua sponte* as being in violation of CPLR 3212(b) and contrary to precedent set by the Appellate Division in the taxpayers' action which precipitated the libel underlying this action. Further, when respondent publisher undertook for the first time on appeal to impugn by argument the evidence at Special Term on the subject of the gagging of petitioners, petitioners endeavored in their motion for reargument of the appeal to place before the Appellate Division the documentation (App. E) underlying this evidence, pursuant to the Court's power to make new findings of fact under CPLR 5501(c). The Appellate Division's affirmance, rendered without opinion, does not necessarily mean that it agreed with the reasons assigned by the Special Term judge for the dispositions made on the motion. See *Rogers v. Decker,* 131 N.Y. 490; *S. W. Scott & Co. v.. Scott,* 186 App. Div. 518; *Rose v. Imbrey* (not officially reported)37 N.Y.S.2d 793. We assume, therefore, for the purposes of this petition that even prior to the motion for reargument that the Appellate Division made its own independent examination into the record as to the facts and circumstances of the investigatory activity leading to the publication of the libel.

THE MOTION IN THE COURT OF APPEALS –

Since the disposition of the federal questions at Special Term turned on subsidiary state questions of a non-constitutional nature, i.e., evidentiary and procedural, petitioners sought leave to appeal to the Court of Appeals from the order of affirmance entered by the Appellate Division under the statute governing permissive appeals. In the moving papers served and filed in

June, 1971. petitioners' affidavits alleged that they had not been served with copies of the order of affirmance and order denying leave to reargue the appeal entered at the Appellate Division, in conformity to Rule 500.9(a) of the Rules of Practice of the Court of Appeals (Rule 500.9(a), Title 22(A), Official Compilation of Codes, Rules and Regulations of the State of New York) which states:

* * * *

> The moving papers shall state the date when service, if any, of a copy of the order or judgment sought to be appealed from was made on movant . . .

Respondents did not dispute the allegation of non-service as stated in petitioners' affidavits. Instead, they argued in their joint opposing memorandum that a copy of the Appellate Division's order of affirmance with written notice of entry had been duly served by mail upon the attorney for plaintiffs-appellants on January 13, 1971, upon the authority of CPLR Rule 2103(b) which provides:

> Except where otherwise prescribed by law or order of Court, papers to be served upon a party in a pending action shall be served upon his attorney.

The order of dismissal entered by the Court of Appeals herein recites no facts or authorities indicative of that Court's basis for the ruling of 'untimeliness'.

REASONS FOR GRANTING THE WRIT

A – The dismissal of petitioners' motion in the Court of Appeals for leave to appeal constitutes no bar to this Court's consideration of the federal questions raised herein. The motion should have been considered by the Court of Appeals on its merits as petitioners were not in default under CPLR 5513(c), and the decision of that court to the contrary serves no useful state purpose.

B – The pre-trial dismissal of the instant action at Special Term resulted in the total denial to petitioners of their day in court devoid of any meaningful application of the constitutional malice test enunciated by this Court in *New York Times v. Sullivan*, 376 U.S. 254. In the case of the libel causes the malice test was plainly misapplied. And in the case of the slander causes the application of the malice test was plainly premature.

The Appellate Division possessed the means of rectification of the errors committed at Special Term in the form of its own persuasive evidentiary and procedural precedents developed in cases involving state substantive issues. However, for reasons unknown to petitioners that court failed to apply these precedents to the substantive federal questions involved in this case. And the consequence of the Appellate Division's affirmance of the Special Term decisions is to leave in effect decisions which have no legitimate claim on compliance with the mandate in *New York Times v. Sullivan, supra* – decisions which are in and of themselves a negation of constitutional equal protection and due process. The instant case, therefore, presents a proper occasion for this court's concern to the end that the constitutional malice test may have uniform application.

C – Additionally, there is need within the context of Question No. 2 posed in this petition for this Court to decide whether a refusal on the part of an editor of a newspaper to publish a retraction of or reply to a libel at the instance of aggrieved persons amounts to constitutional malice. This question was essentially left unanswered by this Court in the *New York Times* case for want of an appropriate record in that case for its determination. The instant case presents pertinent facts relevant to this subsidiary question in view of the record evidence of the use of interpolations by the news media from which the later refusal comes, thus giving rise at least to a circumstantially-connected relationship between the libel and the refusal. *Cf. Indianapolis Newspapers, Inc. v. Fields,* 259 N.E. 2d 651, 666, Cert. den., 400 U.S. 930.

The importance of a determination of this subsidiary question at this time is underscored by the current handicap under which victims of libel by press labor as compared to the more fortunate victims of libel by regulated media such as the radio and television to whom the right of response is assured – a circumstance most recently called to mind by this Court in the plurality opinion in *Rosenbloom v. Metromedia,* Inc., — U.S. — 29L. Ed.2d 296, 91 S. CT. —. See also, *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367. It can hardly be questioned that the need for seasonable response by victims of press libel while they remain in the public eye is no less urgent than the need for response by victims of libel committed by the regulated media. Consequently, we submit that any deferment of a consideration of this subsidiary question by this court beyond the circumstances of the instant case can only lead, in the light of the prevailing opinion at Special Term, to a progressive diminution of the ranks of ordinary citizens who are willing to participate in the affairs of government at the expense

of a remedy in either the press or the courts for the redress of injury sustained by them through the use of calculated falsehoods said to have been induced by their activities.

ARGUMENTS

A – The question as to what procedural defaults sustained by a party in the state courts will bar subsequent review by this court of underlying federal questions is a federal question. *Henry v. Mississippi*, 379 U.S. 443, 447, reh. den. 380 id. 926. New York is one of the states in which a limitation on the right of appeal in civil litigation, both direct and permissive, is measured from the time of the giving of notice of the entry of the challenged judgment or order. In using language in section 5513 (c) which is peculiar to an individual possessing an anticipatory state of mind, i.e., service upon the party seeking permission, the legislature of New York provided in clear, unmistakeable terms that the notice of entry, in the case of permissive appeals, must be given to the party, as distinguished from any former attorney for such party, in order to limit the party's time to seek leave to appeal from an adverse judgment or order, in this case 30 days. The words "party seeking permission" are wholly incongruous to any authority in an action possessed by a former attorney-authority which terminates upon the entry of a judgment order in the lower court. *In re Luckenbach's will*, 278 App. Div. 114, reversed in part on other grounds, 303 N.Y. 491, 104 N.E.2d 870. And the statutory language imposing a limitation upon the right of appeal must be strictly construed against the party seeking to limit such right–in this case the respondents. *Good v. Daland*, 119 N.Y. 153, 23 N.E. 474.

The words "party seeking permission" appearing in section 5513 (c) are new and constitute a change made by the legislature in the language used in the predecessor statute,

section 592 (3) of the Civil Practice Act (see Clevenger's, New York Practice Manual, 1962 Annual, CPA section 592 (3) (App. F) which did not designate the person upon whom the notice of entry was to be served in order to limit the party's time to seek permission of the Court of Appeals to appeal from an adverse determination of the appellate division.Consequently, the Court of Appeals, acting pursuant to section 51 of the Judiciary Law (McKinney's Cons. Laws of N.Y., Book 51, section 51) which empowers that court to adopt practice rules "not inconsistent with the constitution or statutes of the state" filled the void existing in section 592 (3) by adopting practice rule III (Clevenger's, New York Practice Manual, 1962 Annual, Section on Court Rules) which reads:

> The attorneys and guardians ad litem of the respective parties in the Court below shall be deemed the attorneys and guardians of the same parties respectively, in this Court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

The rules of the Court of Appeals have the force of law and are binding upon parties and their attorneys. *In Re Moore,* 108 N.Y. 280, 15 N.E. 369. Thus, the impact of Court of Appeals practice rule III, insofar as that Court was concerned, was to continue the authority of attorneys below so as to authorize service by and upon attorneys of record in the Court below of the notice of entry. However, with the advent of the Civil Practice Law and Rules in New York in 1963, and section 5513 thereof, the legislature preempted the subject of limitation of the right of appeal in civil litigation with its own uniform treatment for all the Courts, presumably cognizant of the Court of Appeals practice rule III as it applied to that particular court. And with the deletion of the words "attorney for" formerly

appearing in subsection 1 of section 592 (direct appeals) and the addition of the words "upon the party seeking permission" to the solitary word "service" formerly appearing in subsection 3 of section 592 (permissive appeals), the legislature, in section 5513, expressed dissatisfaction with the old practice of measuring the ongoing rights of the litigants by the service of papers on their former attorneys.

The most recent event in New York prior to the instant motion for leave to appeal which is indicative that the Court of Appeals acknowledged the aforesaid change in practice brought about by the CPLR, was the 1968 revision by the Court of Appeals of its own rules of practice. Simultaneous with the adoption of rule 500.9 (a) in which the Court of Appeals refers, for the first time, to the party seeking permission as the "movant", the Court in its rule revision deleted its long standing practice rule III, thus recognizing that the extension of the authority of the attorneys below under rule III could no longer be applied in that Court consistent with section 5513. It, therefore, serves no useful state procedural purpose for the Court of Appeals to return, in the unheralded[3] decision in this case to a practice abolished by a statutory change and its own conforming practice rule change.

Since the position taken by the Court of Appeals in this case is inconsistent with its previous position (as manifested in rule changes that parties and attorneys are bound to take notice of and be governed by) its decision herein is not binding on this Court and should not influence this Court since in the instant case the Court of Appeals does not make its position clear although the situation requires clarity if that Court is to avoid

the inference that it acted out of a desire to frustrate the further consideration of the underlying federal questions. *N.A.A.C.P. v. Alabama,* 357 U.S. 449.

Rule 2103(b) relied upon by respondents to defeat petitioners' application before the Court of Appeals is not contrary to or inconsistent with the contention of petitioners herein. That rule is limited in its application to the service of intermediary papers in a pending action. *Monarch Insurance Co. v. Pollack,* 32 A.D.2d 819, 302 N.Y.S.2d 432. And Rule 2103(b) does not purport to legislate on the subject of when and under what circumstances the authority of an attorney to act for a party terminates.

B – Any independent view of the facts of record relating to the libel causes which the Appellate Division might take would, of necessity, bring that Court squarely up against the conflicting versions of the 'interview' contained in the *moving papers* at Special Term. In view of the dismissals herein petitioners are entitled to have the proof of record read in the light most favorable to them and to have the benefit of reasonable inferences which can be drawn therefrom. *African Metal Corp. v. Bullova,* 288 N.Y. 78, 41 N.E.2d 466.

If credence be given to the Margles affidavit over the Horgan affidavit on the disputed matters, it will be seen that Margles, while he delivered at best only half truths to reporter Horgan concerning the nature of the civil action instituted by petitioners and others against the town board, at least he informed her that the action had been brought by petitioners *on behalf of the town,* or, in other words, in a representative capacity, and further, that his statements on the subjects of legal harassment and political motivation were premised upon his belief and opinion. Margles stuck to this position throughout his affidavit, contending, not that petitioners actions

constituted legal harassment and political motivation *per se* as stated in the libel, but only that *he* believed that they did.

The discrepancies between the Margles affidavit and the libel are significant. Petitioners had nothing to fear from a disclosure in respondent publisher's newspaper during referendum week that they had commenced an action against the town board for the recovery of $350,000 in damages, so long as the news article disclosed that the recovery was sought *on behalf of the town.* Ample legal precedent then existed in the judicial department for such a move on petitioners' part. See *Knapp v. Fasbender*, 278 App. Div. 970, and *Levert v. Fasbender* (not officially reported) 119 N.Y.S. 2d 41.

Furthermore, most of the taxpaying property in the town on whose behalf petitioner Antonio Mareno had acted in concert with others in the referendum effort was necessarily situated outside of the improvement district that stood to benefit from the contemplated expenditure of taxpayers' funds. Hence, a disclosure at this point of a lawsuit in which the taxpayers would be the beneficiaries of a successful prosecution, would merely have underscored the sincerity of the contemporaneous activity of petitioner Antonio Mareno in the referendum effort which gave the taxpayers still another opportunity to veto further expenditures of taxpayers' monies for the same object.

On the other hand petitioners had much to fear from a false disclosure in respondent publisher's newspaper that they had instituted an action against the town board *as private citizens*, and from any thwarting of their efforts to explain their behavior. For even the most unsophisticated taxpayer in the town, upon not hearing anything from petitioners on the matter and knowing nothing of their efforts to be heard, would view the published account of their behavior as tending to benefit

the individual litigants, look upon the referendum activities of petitioner Antonio Mareno as leverage to support his own private ends, and as a consequence, react thereto with indignation. Particularly so, when one of the town's leading citizens (town attorney Margles) is depicted in the published account as having reacted in precisely such an indignant manner, and as having predicted that other townspeople would do likewise toward petitioners.

Such a state of affairs was achieved herein by respondent publisher in its news article of July 26, 1965, through its interpolations, its transformation of respondent public official's role as *informant* to that of *reactionary*, and its subsequent gagging of petitioners. Consequently, if the Margles version is given credence over the Horgan version and the resultant published account, it can be readily seen that the published account is nothing less than calculated falsehood. And, as this court intimated in *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, distortion of the facts should be assessed by the courts in defamation actions against the constitutional malice standard.

Resolution at the pre-trial stage of the litigation of the question of credibility arising from the inconsistent accounts of the interview reflected in the moving papers, if adverse to petitioners, deprives petitioners of the opportunity at a trial to impugn the veracity of the affiant giving the account least favorable to them – in this case affiant Horgan. Moreover, resolution of such unilateral inconsistencies on a motion for summary judgment has been held by the Appellate Division to be premature in *Mandell v. Field*, 11 A.D. 2d 1074. In the instant case the unilateral inconsistencies are an affliction of the moving party's case (respondent publisher) at Special Term, and not of the responding party's case (petitioners) as in *Mandell*. Consequently, the principle of the *Mandell* case, decided on appeal by a panel of judges which included a majority of the

judges sitting in this case, should have been applied to the facts of the instant case by that Court with even more compelling force than actuated that Court in *Mandell*. Particularly so, in view of the fact that the Appellate Division, subsequent to its decision in *Mandell*, took the position that on motions for summary judgment that Court does not reach the deficiencies of the responding party's case where it finds the moving party's case to be deficient. See *Morgan v. Springer*, 12 A.D. 2d 626. It is clear, therefore, that in the instant case the Appellate Division has moved decidedly away from the principle it adopted in *Mandell v. Field, supra*. And petitioners have found no contrary precedents on the subject in decisions of the Court of Appeals.

C – The dismissal of the 'independent' slander causes at bar on the vehicle of the motion directed solely at the libel causes is unprecedented in New York, is in derogation of the due process provisions of CPLR 3212 (b) on which the state Courts base their action, and serves no useful purpose in this litigation except, perhaps, as a corollary to the dismissal of the libel causes, to shield from public view the disquieting behavior of respondent publisher in 'managing' the news relating to petitioners that was bound to be disclosed to the jury as much in the prosecution of the slander causes as in the libel causes had the former been allowed to go to trial. The counter summary judgment provision of the last sentence in CPLR 3213 (b) is connected to the preceding sentences in that statute. In this posture counter summary judgment is applicable only to a 'cause of action' which is the subject of the *moving* papers without regard to the identity of the party responsible for bringing that cause of action before the Court for disposition. Thus, the moving affidavit is required to show that the cause of action lacked merit, thereby putting the parties on notice that the affected cause of action is subject to a disposition by the Court more extensive than that contemplated in the motion. In the instant case it was the Courts' plain duty toward petitioners

as to the excluded slander causes to sever the action as to such causes. See *Pease & Elliman, Inc. 926 Park Avenue Corp.*, 23 A.D.2d 361, affirmed, 17 N.Y. 2d 890, 218 N.E.2d 700.

Apart from the manifest limitation above noted, it is to be noted that in a multiple claim case less inhibited for purposes of the counter summary judgment feature than the instant case because it involved an application of the 'search the record' doctrine, i.e., an attack upon a responsive pleading which subjected the initiatory pleading to search, the Appellate Division reinstated 3 of 5 causes of action that had been dismissed at special term under this doctrine. See *Mareno v. Kibbe*, 32 A.D. 2d 825, modifying 56 Misc. 2d 451. In the *Mareno* case, which is the taxpayers' action that precipitated the libel sued upon herein, the Appellate Division said:

> In our opinion, Special Term should not on its own motion have treated plaintiffs' motion as a motion for summary judgment as above described (CPLR 3211, subdiv.(c)). No request for summary judgment was made on behalf of respondents in the affidavit submitted in opposition to plaintiffs' motion; and though occasions will arise when summary judgment may properly be granted when motions to dismiss pleadings have been initially served (Cf. 4 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 3211.50), we think that the parties should be apprised of the court's intention so to treat the pending motions before it prior to decision, so that an appropriate record and submission of the facts and law may be made by the parties. It is not apparent on this record that the parties were informed prior to decision of the court's determination to treat the pending motion as one for summary judgment.

The *Mareno* case rule has been followed by special term in this judicial department in *Lustig v. Congregation B'Nai*

Israel of Midwood, 62 Misc. 2d 216, 308 N.Y.S. 2d 480. And that rule should have been applied here by the Appellate Division which authored it with even more compelling force that existed in *Mareno* since the instant case gave Special Term no occasion as in *Mareno* to look elsewhere in the pleadings but to the specific causes of action under attack in respondent publisher's motion. Here too, petitioners have found no precedents to the contrary among Court of Appeals' decisions on the subject.

CONCLUSION

For the reasons asserted herein Petitioners' application for a writ of certiorari should be granted by the court.

Respectfully submitted,

Antonio Mareno
Kathleen Mareno
Petitioners pro se

September, 1971

FOOTNOTES:

[1]It would appear that respondent publisher has a penchant for curbing speech in the communications media it controls in Westchester County which does not identify with its own interests in local government. See and compare its record of editorial suppression in *Moran v. Catherwood*, 34, A.D.2d 694, affirmed, 27 N.Y.2d 946, *267* NE.2d *104*, with its earlier suppression of statements of petitioner Antonio Mareno in exhibits F and A in this record (A23,25,53-54). The *Moran* incident first came to petitioners' attention in an article appearing in The New York Times of February 3, 1967 on page 29 which identified respondent publisher as the suppressor (although the court opinions in the case do not), and furnished petitioners with the only real answer they have had as to why petitioner Antonio Mareno was the victim of a press 'gag' at such a critical time. In view of respondent publisher's apparent success in the New York Courts in curbing speech on public issues of both the 'protected' (Mareno – libel) and 'unprotected' (Moran – unemployment insurance) varieties, and its recalcitrant posture in this case (in its brief on appeal respondent publisher disclaimed any obligation to publish at the instance of petitioner Antonio Mareno whom it described as a 'controversialist'), one has to wonder if there can ever be robust, wide open bilateral discussion of public issues between local public officials in Westchester County and its citizen critics in respondent publisher's Westchester press; and whether its subscribers there are destined to remain a 'captive' audience on such issues.

[2]Respondent publisher took petitioners to task before the Special Term judge for even being concerned there with respondent public official on its motion to dismiss the libel causes. In its Reply Memorandum at Special Term respondent publisher argued that considerations relating to the slander causes were irrelevant to a consideration of the issues under the libel causes because the slander causes were independent causes of action.

[3]Absent any statement of the controlling facts or expression of views in the dismissal order not only are the parties and their attorneys kept in the dark, but the legislature and practising attorneys are lulled into a false sense of security as to what the prevailing practice is with respect to a limitation of a party's time to prosecute appeals under CPLR 5513.

APPENDIX A – OPINION (Special Term)

SUPREME COURT : WESTCHESTER COUNTY

KATHLENE C. MARENO and ANTONIO MARENO,

Plaintiffs,

-against-

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,

Defendants.

Index No. 6893-1966

McCULLOUGH, J.

In this libel action the defendant, Westchester Rockland Newspapers, Inc., hereinafter referred to as the newspaper, moves, pursuant to Civil Practice Law and Rules, section 3211(a)7 and section 3211(c), for an order dismissing the complaint and granting this defendant summary judgment.

The controversy arose in 1965 as a result of action by the Town Board of the Town of Yorktown in connection with the appropriation of money for capital improvements. The plaintiffs, who are residents and taxpayers in the Town of Yorktown, were not in agreement with the actions of the Town Board and the plaintiff, Antonio Mareno, an attorney, had written letters to the defendant newspaper which were critical of the Town Board. A referendum on a bond issue to finance

the capital improvement was scheduled to be held on July 30, 1965. Just six days before the referendum the plaintiffs commenced an action as Taxpayers of the Town of Yorktown, County of Westchester, on behalf of themselves and other persons similarly situated against the Town Board of the Town of Yorktown seeking an order directing the Town Board to restore certain roads and charge the cost thereof the specific districts, enjoining the Town Board from making certain road repairs and directing them to account for certain Town funds and to pay damages to the Town, and for damages allegedly suffered by the Town for alleged wrongful and illegal tax appropriations by the Town Board.

A day or two later, a reporter for the newspaper had a telephone conversation with the defendant, Raymond J. Margles, the Town Attorney, and thereafter on July 26, 1965 the newspaper printed, as a news article, the announcement of the commencement of the action and the comments of the Town Attorney in connection therewith. It is these comments and this article that are the basis for this lawsuit.

The complaint sets forth four causes of action. The first and third are grounded in libel against the defendant newspaper, the second and fourth refer to the same items, but are grounded in slander against the defendant, Raymond J. Margles, Esq. While this motion was made only by the defendant newspaper with reference to the first and third causes of action, the court has the power on such a motion to consider the validity of the claims set forth in the second and fourth causes of action as well. (CPLR section 3212(b)).

It is the contention of the defendant newspaper that at the time the article was published no one connected therewith had any knowledge that there was anything false in the publication and did not publish with reckless disregard of truth or falsity, or

in extreme departure of responsible publishing procedures. This court agrees with the contention of the defendant newspaper that, by the standards set forth in New York Times v. Sullivan (376 U.S. 254, 11 L. ed.2d 686), and the companion cases of Curtis Publishing Co. v. Butts, and Associated Press v. Walker (388 U.S. 130, 18 L. ed.2d 1094), the statements contained in the article not actionable as against the defendant newspaper.

A reading of the various affidavits and examinations before trial demonstrate clearly that the plaintiffs had thrust themselves to the fore in a public controversy. In connection with the actions of the town board, the plaintiff, Antonio Mareno, had written letters to the editor of the defendant newspaper, with the obvious intention that such letters should be published. The plaintiffs commenced an action against the town board, not only as individuals but "on behalf of themselves and all other persons similarly situated." This action indicates a clear intention to engage publicly in a general controversy in their community. Once the plaintiffs had undertaken to put themselves in this position it follows logically that they should have expected criticism from those persons who did not agree with their position.

By the same token, the court is of the opinion that the second and fourth causes of action should also fail. There is absolutely no indication that there was any deliberate malice on the part of the defendant Margles, and the statements complained of appear to be merely the spontaneous remarks of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit. The plaintiff has not alleged any special damage and this court cannot conceive that the utterances complained of have in any way damaged him in the practice of his profession (Gilber v. Gioffi, 21 A.D.2d 517, and cases cited therein).

Mr. Justice Brennan in the New York Times case (supra), at page 270, quoted Mr. Justice Brandeis as follows:

"Those who won our independence believed * * * that public disucssion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

For the reasons set forth above, the compiaint is dismissed.

Submit judgment on notice.

Dated: WHITE PLAINS, NEW YORK
June 11, 1969

/s/ Frank S. McCullough
FRANK S. McCULLOUGH
J.S.C.

APPENDIX B– Order on Appeal from Order – Judgments

Calendar No. 1164E

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 5, 1970

HON. MARCUS G. CHRIST, Presiding Justice

HON. HENRY J. LATHAM
HON. PHILIP M. KLEINFELD
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN – Associate Justices

SAME TITLE

In the above entitled cause, the above named Kathlene C. Mareno et al., plaintiffs, having appealed to this court from an order-judgment of the Supreme Court, Westchester County, dated June 30, 1969; and the said appeal having been argued by Timothy M. Taylor, Esq., of counsel for the appellant, and submitted by Charles B. McGroddy, Jr., Esq., of counsel for the respondent Westchester Rockland Newspapers, Inc., and by Raymond J. Margles, Esq., of counsel for respondent Margles; and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order-judgment appealed from his hereby unanimously affirmed, with a separate bill of $10 costs

and disbursements to each respondent.

Calendar No. 1164E

Enter:

Herman M. Pogul
Clerk of the Appellate Division

APPENDIX C – Order Denying Motion to Reargue Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County onDecember 1, 1970.

HON. MARCUS G. CHRIST, Presiding Justice

HON. HENRY J. LATHAM
HON. PHILIP M. KLEINFELD
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN – Associate Justices

SAME TITLE

In the above entitled cause, the above named Kathlene C. Mareno, et al., appellants, having moved to reargue the appeal from order-judgment of the Supreme Court, Westchester County, dated June 30, 1969;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which

the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

Herman M. Pogul
Clerk of the Appellate Division

APPENDIX D – Order Dismissing Motion to Appeal

STATE OF NEW YORK Calendar No. 624

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A.D. 1971.

PRESENT, HON. STANELY H. FULD, Chief Judge, presiding.

SAME TITLE

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed, with ten dollars costs, upon the ground it was not timely made.

(SEAL)

A copy

/s/ Gearon Kimball
Deputy Clerk

APPENDIX E

(THE REPORTER DISPATCH LETTERHEAD)

August 2, 1965

Mr. Antonio Mareno
RFD 2, Tulip Drive
Yorktown Heights, New York

Dear Mr. Mareno:

Your letter of July 27 will not be published as it does not contribute anything new to the discussion but is mainly repetitious and carping.

Very truly yours,
THE REPORTER DISPATCH
Westchester Rockland Newspapers, Inc.

/s/ William I. Bookman

William I. Bookman
Editor

WIB:fs

APPENDIX F

§ 592. Limitations of time; procedure to obtain permission to appeal. Appeals and applications for permission to appeal to the court of appeals pursuant to this article shall be subject to the following limitations of time:

1. An appeal as of right to the court of appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time to appeal.

2. An application to the appellate division for permission to appeal to the court of appeals from a judgment or order of the appellate division, or of the court of original instances, *must be made by serving all required papers within thirty days after service of a copy of the judgment or order sought to be appealed from, with notice of entry thereof, and the application will then be deemed returnable at the next motion day in the appellate division occurring more than four days after such service.*

3. An application to the court of appeals for permission to appeal must be made by serving all required papers within thirty days after service of a copy of the order of the appellate division denying permission to appeal, with notice of entry thereof, *or, if the application be made directly to the court of appeals, within thirty days after service of a copy of the judgment or order sought to be appealed from, with notice of entry thereof, and*[1] the application will then be deemed returnable at the next motion day in the court of appeals occurring more than four days after such service.

4. An application to the court of appeals pursuant to permission must be taken within thirty days after entry of the order granting such permission.

5. Notwithstanding any of the foregoing limitations.

(a) An appeal as of right to the court of appeals may be taken within thirty days after entry of an order denying an application for permission to appeal upon the ground that the appeal would lie as of right;

(b) An application for permission to appeal may be made following dismissal of an appeal taken as of right, provided that the court is otherwise authorized to grant permission to appeal and the proceedings have not been improperly delayed

(i) by applying to the appellate division *in the manner provided in subdivision 2 of this section by serving all required papers within thirty days after entry of* the order of the court of appeals dismissing the appeal, and then, in case of refusal, by applying to the court of appeals within the time limited by subdivision 3^2 of this section, or

(ii) by applying to the court of appeals within thirty days after entry of the order dismissing the appeal;

(c) An application in the appellate division for permission to appeal to the court of appeals may be made in the manner provided in subdivision 2 of this section by serving all required papers within thirty days after entry of an order of the court of appeals denying or dismissing an application for permission to appeal made directly to the court of appeals pursuant to subdivision three (b) of section five hundred eighty-nine, on the ground that the judgment or order sought to be appealed from, does not finally determine the action or special proceeding in which it is entered, provided that the proceedings have not been improperly delayed;

(d) An appeal taken to the court of appeals pursuant to permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the proceedings to obtain such permission were begun within the time limited for an appeal as of right;

(e) An appeal to the appropriate appellate court may be taken within thirty days after entry of an order by the court of appeals dismissing an appeal taken from a judgment or order of a court of record of original jurisdiction, upon the sole ground that such appeal is not authorized by subdivision four of section five hundred and eighty-eight *or by section five hundred and ninety* of this act.

6. Omitted.

Supreme Court, U.S.
FILED
NOV 10 1971
CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 71-479

KATHLENE C. MARENO and ANTONIO MARENO,

Petitioners,

vs.

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971.

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vs.

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Respondents.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

In the belief that this court applies its own test as to whether a procedural default sustained in a state court action is based upon an adequate non-federal ground petitioners are moved to answer herein some of the arguments advanced in the responding briefs which seem in need of reply.

Argument

I.

THE STATE OF CIVIL APPELLATE PROCEDURE IN NEW YORK PRIOR TO THE CPLR LEFT THE LEGISLATURE NO CHOICE BUT TO DELETE THE REFERENCE TO ATTORNEYS AND TO REQUIRE SERVICE OF THE NOTICE OF ENTRY UPON THE LITIGANT.

In signing the CPLR into law Governor Rockefeller's Memorandum of Approval reflects the concerns of the state legislature in the revision of civil practice in New York when he stated (2 McKinney's N.Y. laws '62, p. 3621):

> "The bills repeal the present Civil Practice Act and enact a new Civil Practice Law and Rules, to be effective on September 1, 1963. The new law, which will regulate the practice in the Courts of Record in the State, is a major restatement and clarification of existing law. Great numbers of conflicting and confusing provisions, resulting from years of piecemeal amendment, have been eliminated. The more than 2,000 sections of the present Civil Practice Act and Rules of Civil Practice have been reexamined and reduced to 600 sections in the new law."

Nowhere was this conflict and confusion more evident than in the prior provisions dealing with the subject of limitation of time to prosecute civil appeals.

The CPA had four provisions relating to direct appeals, namely, sections 592(1), 612, 624 (1), and 632. (See Clevenger's Practice Manual, 1962 Annual, CPA sections 592(1), 612, 624(1), and 632.) The first three provisions governed appeals in actions from interlocutory and final dispositions, and uniformly required service of the notice of entry upon "the attorney for the appellant". Section 632 only governed appeals in special proceedings from final dispositions, and required the service of the notice of entry upon "the appellant; or, if he appeared upon the hearing by an attorney at law or an attorney in fact, upon the person who so appeared for him".

Under the CPA when the term "appellant" was used by itself to designate the person upon whom the notice of entry was required to be served as was the case with section 632 noted above, the term referred to the litigant and not to an attorney. The trouble was with the expression "attorney for the appellant" as used in sections 592(1), 612, and 624(1) noted above. While this term was satisfactory when used to designate the person upon whom the notice of entry was to be served in the case of interlocutory appeals, the term was anachronistic when attempted to be applied to situations involving final dispositions for the reason that under common law doctrine in New York, recognized by the legislature in CPA section 632, the authority of the attorney ceased upon the entry of the final judgment (See In re Luckenbach's Will, cited on page 15 of the petition), and as a consequence, the attorney for the defeated party at the termination of the litigation could not be designated "the attorney for the

appellant", whatever else he might be called in such posture.

The New York legislature quietly solved this problem encountered in CPA sections 592(1), 612, and 624 by (1) abolishing the distinction between actions and special proceedings (McKinney's Cons. Laws of N.Y., Book 7B, Section 103(b)), (2) merging these statutes together with CPA section 632 into a single statute, namely, CPLR 5513(a), (McKinney's Cons. Laws of N.Y., Book 7B - CPLR 7701 to End - Comparison Table 1, page 473), and (3) borrowing from CPA section 632 the word "appellant" to measure the limitation of appeal time as to both interlocutory and final dispositions, it being apparent to the legislators that the word "appellant" was susceptible of no double meaning in the predecessor statute.

It is to be noted that the aforementioned changes would not have been necessary in the transition from the CPA to the CPLR had CPA section 163, the predecessor of CPLR 2103(b), been applicable to these specific appeal provisions of the CPA. CPA section 163 read in relevant part (Clevenger's Practice Manual, 1962 Annual, section 163):

> "Where a party has appeared a notice or other paper required to be served in an action must be served upon his attorney. . . This section shall not apply . . . to a case where the mode of service is specially prescribed by law."

However, as the last sentence noted above indicates, CPA section 163 was residual in its application. And since the mode of service was specifically prescribed by law in sections 592(1), 612, 624(1), and 632, section 163 was inapplicable to these provisions. And the same relationship exists under the CPLR between section 5513 and Rule 2103(b) in view of the prefatory language in Rule 2103(b), "Except where otherwise prescribed by law or order of court" which relegates that rule to residual status under the CPLR also. Consequently, to accord Rule 2103(b) other than residual status as contended for by respondents, vis-a-vis section 5513, would be to read back into section 5513 the anachronistic posture and uncertainty of meaning that the legislature undertook to eliminate in the adoption of section 5513. And we do not know that the Court of Appeals applied Rule 2103(b) in its disposition of petitioners' motion for leave to appeal from the Appellate Division's order of affirmance. That court's view on the subject has simply not been made public.

Petitioners have called attention to the history of CPLR 5513(a) because the effect of the decision of the Court of Appeals on petitioners' motion for leave to appeal is not only to close the door as to petitioners' broader permissive appeal remedy (involving subsidiary evidentiary and procedural questions dispositive of the federal questions), but that ruling also aborts any ambition petitioners might have had to pursue, if necessary, the narrower direct appeal[1] remedy (involving direct

1. It is on the matter of the direct appeal approach that petitioners here have avoided the pitfalls of the McMaster case cited in the brief of respondent publisher at page 8. On the instant facts that case is inapplicable because the question of the (Cont'd)

constitutional questions), since the adjudication of "untimeliness" casts its shadow across both remedies. However, with respect specifically to the virgin language of CPLR 5513(c), we submit that the concept of serving a party instead of an attorney with papers is not a radical view in New York. And respondents' argument to the contrary is a bit overdone. In a situation analogous to the case at bar Special Term rejected the contention that service of a notice of disclaimer by an insurance company upon an attorney retained by an injured person to institute a common law negligence action constituted service upon the injured person for purposes of setting into motion a 10 day period of limitation within which the injured person was authorized to institute a statutory action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) — Special Term being of the opinion that the notice was required by the terms of the statute to be served upon the injured party personally. See Matter of Savoy (not officially reported), 232 N.Y.S. 2d 396, affirmed in 22 A.D.2d 855. In this case Special Term said, among other things:

> . . . The statute provides that written notice be given to the injured party by the insurer (Insurance Law, par. 167, subdiv. 8). The term written notice "carries with it the implication of receipt or delivery." (Baldwin v. Fidelity Phenix Fire Insurance Co. N.Y., 6 Cir., 260 F.2d 951, 953.) The language of the statute

---

(Cont'd)
default in the Court of Appeals is the primary question for consideration here, whereas in McMaster the choice of remedy was the primary question before the court.

> is so clear and unambiguous that resort to rules of construction is made unnecessary (New Amsterdam Casualty Co. v. Stecker, 3 N.Y. 2d 1, 6, 163 N.Y.S.2d 626, 143 N.E.2d 357). As heretofore noted, the mandatory language of the Legislature directs that the insurer "shall give written notice as soon as is reasonably possible . . . to the . . . injured person . . . ." (Insurance Law, par. 167, subsec. 8.) . . . .
>
> The court is averse to restricting, by judicial rule, such newly created remedy, a right unknown under common law, where the literal application of the statutory language satisfies the evident purpose of the Legislature. . . .

Also, the clarity of language in CPLR 5513(c) has led one law text writer in New York to comment:

> "In the case of a party seeking permission to appeal, a similar provision is made for service upon him rather than upon his attorney. CPLR 5513, subd c." (Carmondy-Wait 2d, p. 374, note 3.)

Thus, although the Court of Appeals has not overtly construed CPLR 5513(c) in the light of its own practice rule revision and deletion of practice rule III (Petition, p. 17), the conception that notices limiting the period of time for commencing civil actions and prosecuting civil appeals had to be served on the litigant instead of on an attorney has been introduced to lawyers in the state, and had been as of the time the motion was made in the Court of Appeals for leave to appeal on petitioners' behalf and at their express request.

And the dearth of decisional law on the subject by the Court of Appeals only serves to underscore and accentuate in the minds of lawyers in New York the significance of that court's manifest adaptation to this conception.

We submit, therefore, that in keeping with the "sign of the times" petitioners' former attorney was fully justified in believing that the legislature in New York had relieved him of any further responsibility toward petitioners by virtue of an earlier retainer when, more than a month after he had closed his file in the case, he was served with a copy of the notice of entry in question. And we further submit that the attorney cannot be charged with any neglect of petitioners' interests in the interim period when he later acceded to petitioners' request to file the motion for leave to appeal under a new retainer, upon learning that service of the notice of entry had not been made upon petitioners, since that is precisely what CPLR 5513(c) plainly and clearly requires in order to limit the time to make the motion. It is, indeed, a mischievous and elusive argument which presses upon this court the measurement of a procedural default in terms of the inertia of counsel under a system of state law that has induced the very inertia the argument urges this court to condemn.

II.

THE MANDELL CASE IS CONTROLLING IN THE SECOND DEPARTMENT ON THE QUESTIONS OF UNILATERAL INCONSISTENCIES AND CREDIBILITY RAISED ON A MOTION FOR SUMMARY JUDGMENT.

The case of Mandell v. Field which is cited in the petition on page 20, and which is either ignored or summarily dismissed by respondents on the instant facts, does not involve the application of any obscure principle of summary judgment motion practice in New York. Mandell has been cited in a number of decisions at Special Term for the propositions that unilateral inconsistencies and issues of credibility may not be resolved on motions for summary judgment. See Rogers v. Hirshon (not officially reported), 213 N.Y.S.2d 613; Olivieri v. Moran (not officially reported), 213 N.Y.S.2d 628; Bergman v. Kumm (not officially reported), 213 N.Y.S.2d 832; and Glain v. Glain, 57 Misc.2d 127. And Mandell has been cited by three of the four Appellate Divisions in the state, inclusive of the second department, for broader propositions militating against the resolution of issues raised on motions for summary judgment. See Boyles v. Freeman, 29 A.D.2d 559; Colosimo v. Rosenstock, 15 A.D.2d 663; Sonnino v. Gol-Pak Corporation, 15 A.D.2d 740; and Cooper v. Greyhound Bus Corporation, 13 A.D.2d 173.

The facts of the case which bring Mandell into focus here have been outlined in the petition, and, of course, do not warrant repetition as they speak for themselves. And although we are unable to say for

certain, we believe that the relevancy of Mandell to the instant facts may have influenced Special Term's behavior in the case indirectly. For how else can one find virtue in a written opinion which, if it undertakes to speak on the subject of actual malice at all, elects to do so in an area of the case where the Mandell facts are non-existent in preference to the area of the case where the Mandell facts abound in the record. We submit that any fair appraisal of the facts submitted here at Special Term under the libel causes should lead to the judicial restraint exercised in a recent decision rendered in a libel suit in a federal district court in New York not unlike the case at bar. In McNeil Laboratories, Inc. v. La Verne, S.D.N.Y., New York Law Journal of November 24, 1971, page 1, Col. 6B, involving defamatory statements published in The Physicians' Drug Manual and Behavioral Neuro-Psychiatry about Haldol, a tranquilizer used for treating psychoses, Judge Tyler, applying the constitutional malice test of the New York Times rule stated in his decision, among other things:

> "There is evidence indicating that plaintiff may be able to prove that the published statements of defendants were calculated and knowing distortions of the facts regarding Haldol; that the reported sources and authorities for defendants' published statements were knowingly misrepresented. . . ." (Emphasis added.)

On this premise Judge Tyler denied the defendant-publisher's motion for a summary judgment of dismissal of the complaint. Similarly, in the instant case a direct confrontation with the Mandell facts of record should have produced the same results here.

III.

THE QUESTION OF DAMAGES, IF RELEVANT, WAS OBVIOUSLY MISUNDERSTOOD BY THE NEW YORK COURTS, AND, APPARENTLY, BY THE RESPONDENTS BEFORE THIS COURT.

The matter of damages sustained by a plaintiff in a defamation suit is rarely, if ever, a relevant consideration in resisting a motion for summary judgment (as distinguished from a trial) no less so in New York than elsewhere in the country. And Special Term in this case appears to have broached the subject only as a kind of self-indulging assurance that it was not harming petitioner Antonio Mareno through judicial encroachment[2] in an area of the case not tendered to the court on the motion for summary judgment. But even if damages were a relevant concern for the court at this point, it is clear that Special Term was looking in the wrong direction in its assessment of the damage element — being of the opinion that because petitioner Mareno was not engaged in the private practice of law, or "hanging out a shingle", as it were, he could sustain no damage in the practice of his profession. This posture, we submit, constitutes an unduly restricted view of the element of damage in a defamation action.

2. Respondent Margles argues for uniformity of issue between the libel and slander causes in support of Special Term's unannounced invasion of the latter. How can this possibly be in view of the fact that the knowledge with which a publisher writes is, in the very nature of things, different from the knowledge with which his informant speaks? In any event, it should be noted that the attorney who advances this argument on Respondent Margles' behalf is the same attorney who contended at Special Term on behalf of respondent publisher that the slander causes were "independent" of the libel causes.

In the complaint petitioner Mareno pleaded not only past employment as a practising attorney, but also current employment as a law secretary to a federal judge (the language represents the draftsman's characteristization of the actual job description supplied him) (A58-59). Had the state courts allowed themselves to be informed, in a proper judicial setting, of the relevant facts underlying this allegation in the pleading, the following facts would have been developed in the case:

(a) that said petitioner is a law assistant (now some 10 years) to a judge of the United States Customs Court in New York City, a special federal court which, prior to October 1, 1970, possessed both original and appellate jurisdiction;

(b) that the work of the Customs Court is of a specialized nature, the preparation for which is not to be found in the courses of study offered in the law schools, with the result that candidates for service on its professional staff are not recruited from the ranks of recent law school graduates to serve on a rotating or temporary basis, but rather are drawn from the ranks of experienced and practising attorneys in good standing in the customs and other law fields who serve the court on a career basis and at a compensation comparable to what they can earn through employment in private law firms;

(c) that as with many law firms and companies in private industry tenure of service of employees in the court is conditioned, among other

things, upon employee conduct both within and without the court that does not bring the court or its name into disrepute, and employees have been involuntarily separated from service in the court for conduct outside the court which is not exemplary of its moral and ethical standards;

(d) that a substantial number of the judges who administer the affairs of the court, including the judge for whom said petitioner works, resided at the time of the libel in Westchester County wherein respondent publisher's newspaper circulates, and, in fact, one of the court's law assistants residing in Westchester County some 30 miles distant from where said petitioner resides in said county was able to give said petitioner a running account of petitioner's involvement in the Yorktown highway improvement controversy as reported in the press from articles he read in Westchester County based newspapers of the Gannett or Macy chain;

(e) that charges of abuse of legal process and of political scheming publicly uttered are anethema to lawyers in good standing at the bar and to lawyers and other employees in government service, respectively;

(f) that in testimony given in his pre-trial deposition respondent public official gave evidence of being aware, at the time of the slander, that said petitioner was employed in the federal service, from information he sought and obtained from a mutual acquaintance in the Yorktown community;

(g) that respondent public official had a facility for the effective use of the spoken and written word in the persuasion of human beings, having served prior to the slander as campaign manager for the town supervisor in a successfully conducted political campaign for that office, and this talent was articulately pressed into service against petitioners in the slander to bolster the flagging hopes of a town administration for broad-based taxpayer support (in an impending referendum) of an unpopular administration-sponsored tax measure; and

(h) that prior to the utterance of the slander the respondent public official had deliberately misled said petitioner in his response to the petitioner's inquiry relative to the source of town authority for the administration-backed tax measure while being privy to accurate information on the subject of the inquiry.

On the foregoing facts the damage issue foreclosed by the courts is whether the defamatory remarks posed a threat to petitioner Mareno's career in government service, and not as Special Term supposed, a threat to petitioner's career in the private practice of the law. Certainly, the ill-timed gagging invoked against petitioners by respondent publisher can hardly be said to have contributed anything to the protection of that career. But the broader question in the case on the damage issue is whether it is possible for a citizen in this country to find professional fulfillment and a measure of economic security in a career in government service while aspiring to enjoy the benefits and discharge the obligations of

good citizenship; or, whether one facet of such a life must yield to the demands of the other. And since there are thousands of lawyers in government service throughout this nation quietly performing their tasks and living their lives, without whose presence on the job the functions of government would undoubtedly grind to a halt, this broad question of damages seems as worthy of this court's attention as any other question decided in recent years by this court in the defamation field.

Conclusion

No sound reason has been advanced in the responding briefs which should persuade this court to dismiss or deny the petition.

December 3, 1971.

Respectfully submitted,

ANTONIO MARENO and
KATHLENE C. MARENO,
Petitioners pro se

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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-479.

KATHLENE C. MARENO and ANTONIO MARENO,
Petitioners,

vs.

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,
Respondents.

Brief of Respondent, Westchester Rockland Newspapers, Inc., in Opposition to Petition for Certiorari.

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CHARLES B. MCGRODDY, JR.,
Of Counsel.

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In the

Supreme Court of the United States

October Term, 1971.

No. 71-479.

Kathlene C. Mareno and Antonio Mareno,

Petitioners,

vs.

Westchester Rockland Newspapers, Inc., and Raymond Margles.

Respondents.

Brief of Respondent Westchester Rockland Newspapers, Inc., in Opposition to Petition for Certiorari.

Petitioners seek certiorari to the Appellate Division of the Supreme Court of New York, although New York's highest court, the Court of Appeals, dismissed petitioners' motion for leave to appeal to that court because the motion "was not timely made" (Court of Appeals July 7, 1971, Order, p. 32, Petitioners' Brief).

It follows that the decision petitioners ask this court to review was not a decision "rendered by the highest court of a state in which a decision could be had, • • •" (Title 28, §1257 U. S. C.) and, therefore, the petition has no jurisdictional foundation.

The Facts.

Petitioners were plaintiffs in New York Supreme Court libel actions against respondent Westchester Rock-

land Newspapers, Inc., a newspaper publisher, and respondent Margles.

After completion of discovery, defendant Westchester Rockland Newspapers, Inc., was granted summary judgment against petitioners under the New York State Civil Practice Law and Rules by decision dated June 11, 1969, at Special Term of the Supreme Court, and judgment was entered in favor of Westchester Rockland Newspapers, Inc., against plaintiffs (petitioners here) on June 30, 1969.

Petitioners appealed to the Appellate Division of the Supreme Court, which, by order of October 5, 1970, unanimously affirmed the summary judgment. Petitioners then moved in the Appellate Division for reargument, which it denied by order of December 1, 1970 (pp. 30-31, Petitioners' Brief).

Finally, petitioners moved in the New York Court of Appeals for permission to appeal, since under New York practice, the unanimous affirmance by the Appellate Division prevented petitioners from appealing to the Court of Appeals as of right, and required them to move for leave to appeal.

By order of July 7, 1971, the Court of Appeals dismissed the petitioners' motion for leave to appeal "upon the ground it was not timely made" (Appendix D to Petitioners' Brief, pp. 31-32).

Thus, six justices of the New York Supreme Court (one at Special Term and five in the Appellate Division) have found petitioners' libel actions meritless.

There is no Constitutional or Federal Question Presented by Petitioners.

When petitioners moved for leave to appeal to the New York Court of Appeals in June, 1971, that

court determined that petitioners' motion came too late under CPLR 5513 (c), which fixed the time within which such motion could be made, and the court dismissed petitioners' motion for petitioners' failure to move within 30 days after "service upon the parties seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, * * *" (CPLR 5513 [c]).

It is not disputed that a copy of the October 5, 1970, unanimous Appellate Division affirmance of summary judgment against petitioners, with written notice of entry, was served by mail upon petitioners' attorneys on January 13, 1971. Thus, the time within which petitioners could move for leave to appeal expired 33 days thereafter, i. e., on February 15, 1971 (CPLR 5513 [c]).

When petitioners moved for leave to appeal to the New York Court of Appeals in June, 1971, that court determined that petitioners' motion came too late under CPLR 5513 (c), which fixed the time within which such motion could be made, and the court dismissed petitioners' motion as "untimely," i. e., failure to move within 30 days after "service upon the parties seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, * * *" (CPLR 5513 [c]).

Petitioners recognize their four-month delay in moving for leave to appeal to the Court of Appeals in their first "Question Presented" at page 2 of their brief which reads:

> "No. 1. Was the dismissal of petitioners' motion for leave to appeal to the Court of Appeals made upon an adequate state ground which precludes review of the Appellate Division's determination of the underlying Federal questions by a writ of certiorari?"

Mere examination of the uncontested facts compels an affirmative answer to this question of "an adequate state ground" and the clear existence of this adequate ground makes moot petitioners' second and third questions.

Petitioners do not even reach discussion of this essential first question in their petition until at and after page 11, under the heading, "The Motion in the Court of Appeals."

Petitioners' first sentence under that heading reads as follows:

> "Since the disposition of the federal questions at Special Term *turned on subsidiary state questions of a non-constitutional nature,* i. e., evidentiary and procedural, petitioners sought leave to appeal to the Court of Appeals from the order of affirmance entered by the Appellate Division under the statute governing permissive appeals." (Italics supplied.)

This sentence is an admission by petitioners that they have no direct right of appeal to the New York Court of Appeals on the constitutional grounds provided by 5601 CPLR, which reads:

> "(b). Constitutional grounds. An appeal may be taken to the Court of Appeals as of right:
>
> "1. From an order of the Appellate Division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

Petitioners were thus required to move for permission to appeal under 5602 (a) 1 (i) CPLR, entitled, "Appeals to the Court of Appeals by Permission," which reads:

> "5602 (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate

division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

"1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

"(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, * * *."

We pass again to CPLR 5513 (c), the applicable portion of which reads:

"The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry * * *."

Petitioners do not deny that the order of affirmance by the Appellate Division with notice of entry was served on their attorney (who subsequently made the late motion for leave to appeal) by mail, on January 13, 1971. Attempting to avoid the effect of this service as limiting their time to move in the Court of Appeals, they argue under CPLR 5513 above quoted, that the order and notice of entry was required to be served upon petitioners personally, and service on their attorney was insufficient.

Petitions completely disregard R. 2103 (b) of CPLR which reads:

"Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney."

There is no Jurisdiction Here Under §1257 of Title 28.

As petitioners admit at page 1 of their petition, their application is based upon 28 U. S. C. 1257, the applicable portion of which reads:

> "§1257. State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 24, 1948, c. 646, 62 Stat. 929."

This statute is jurisdictional and places upon petitioners the burden of showing that they seek to review a final judgment "by the highest court of a State in which a decision could be had, • • •."

By the facts here, petitioners show that they did not obtain a final judgment of the highest court of New York, i. e., the Court of Appeals, by making a timely motion in that court for leave to appeal, within 30 days after service upon their attorney of Appellate Division's unanimous affirmance of summary judgment against them.

They failed to do this. They delayed for some 90 days after the service on their attorney of the Appellate Division's order of affirmance and notice of entry.

before moving the Court of Appeals for leave to appeal, and that court very properly determined that petitioners' motion "was not timely made."

There can be no dispute that the merits of the Special Term order or the Appellate Division's affirmance of summary judgment were never determined by the New York Court of Appeals, because petitioners made no timely application to that court to review it.

It is this which compels petitioners to raise their first "Question Presented" (p. 2 of Petitioners' Brief) in the form that we quoted, *supra*, at page 3, which presents only a pure question of state procedural law, i. e., will service on a party's attorney under §5513 (c) CPLR limit the time within which to move for permission to appeal.

We must note here that it was petitioners' attorney who was served with the Appellate Division's affirmance and notice of entry, who subsequently made the untimely motion in the Court of Appeals for permission to appeal.

There is nothing remotely resembling a federal question in petitioners' contention that service of an order to be appealed from should have been on them personally and not on their attorney. This is a pure New York question of construction of a New York procedural statute.

Petitioners make no claim of lack of due process or lack of equal protection of the laws, and none could be made arising out of this question of procedural construction.

Petitioners admit on their application for certiorari that this state procedural question is the first, the primary question for decision. We agree with this, and

point out that this is not a federal question: it has no bearing upon or even faint flavor of any federal question but is simply and clearly a construction by the highest court of the State of New York of a New York procedural statute regulating the persons to be served with copies of appealable papers and notice of entry, to limit the time for appeal and motions for permission to appeal.

In *McMaster v. Gould*, 276 U. S. 286, 72 L. ed. 574 (1928), the court dismissed a petition for certiorari to review a judgment of the New York Appellate Division under facts substantially identical to those presented by petitioners here.

In *McMaster*, petitioners had sought leave to appeal from a unanimous Appellate Division affirmance, to the Court of Appeals, by motion in the Appellate Division, which it denied. Then petitioners, without making a motion in the Court of Appeals for leave to appeal, took a direct appeal to that court. The Court of Appeals dismissed the appeal taken without permission (242 N. Y. 604, 152 N. E. 446), as in our case, it dismissed petitioners' untimely motion for leave to appeal.

Dismissing the petition for certiorari for lack of jurisdiction, the Supreme Court wrote (276 U. S. 286):

> "And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for such leave, the judgment is not that of the highest court of the state in which a decision could be had. See *Newman v. Gates*, 204 U. S. 89, 95, 51 L. Ed. 385, 389, 27 Sup. Ct. Rep. 220. In any respect, we are without authority to review the judgment; and the writ is dismissed for want of jurisdiction."

Applying this holding to our case, we state that, since petitioners here did not make a timely motion in the

Court of Appeals for such leave, "the judgment is not that of the highest court of the state in which a decision could be had" (*supra*).

Petitioners Mareno are in an identical situation with petitioners in *McMaster,* whose petition for certiorari was dismissed for failure to move the New York Court of Appeals for leave to appeal. Petitioners here did not make a timely motion in the Court of Appeals for leave to appeal, and their failure to make a motion within the jurisdictional period is the same as the failure of petitioners in *McMaster* to make any motion. An untimely motion, where time is jurisdictional, is the same as failure to move. Petitioners waived their right to seek review by the New York's highest court by delaying their motion for more than 30 days after their attorney had been served with the order below and notice of entry. Their waiver and inaction permitted expiration of jurisdiction to review by the Court of Appeals.

In *McMaster,* the court held that petitioner had affirmatively disclosed lack of jurisdiction under Judicial Code §237 (b) (the predecessor of Title 28, §1257) because *McMaster* had failed to show that New York's highest court, its Court of Appeals, had taken any action with respect to the merits of their claim, but had merely dismissed an improperly taken appeal, as that same court, in our case, dismissed an untimely motion for leave to appeal.

Petitioners endeavor to argue here that their motion for leave to appeal was timely, but this is not a federal question, nor does it arise under §1257 (3) U. S. C.

Petitioners' argument that their motion was timely, to succeed, must overcome the incredible burden of showing that, while a radical change of appellate jurisdictional practice (i. e., the change of requiring service of appealable papers on parties rather than their attorneys)

was effected in 1963 by CPLR 5513, petitioner Mareno is the first lawyer or judge to discover that radical change first disclosed eight years ago.

Petitioners concede that in New York, at all times before the 1963 adoption of CPLR, service of an order or judgment with notice of entry upon the attorney for a party was sufficient to limit time to appeal.

Were petitioners' argument for a radical change in 1963 correct, they would have to show that, with the adoption of CPLR in 1963, a radical change was made not only in motions for leave to appeal to the Court of Appeals: they would also have to show that this change affected all appeals, for 5513 CPLR governs not only motions for leave to appeal, but also "Time to appeal, cross appeal or move for permission to appeal" (section heading) in general. It governs all appeals from all courts to all other courts to which CPLR applies, and any radical change would have affected all these appeals.

It would follow then that, were petitioners correct, the time within which all New York appeals should have been taken, since the adoption of 1963 CPLR, should have been determined by service of the paper appealed from upon the party personally, not upon his attorney, for subdivision (a) of 5513 refers to "service upon the appellant of a copy of the judgment, or order appealed from and written notice of this entry," and subdivision (b), relating to "time to take cross-appeals," reads that "a party upon whom a notice of appeal is served must take an appeal within ten days after such service, * * *."

Thus, petitioners would construe subdivision (b) of 5513 CPLR to mean that not only appealable papers with notice of entry must be served upon parties personally, but also all notices of appeal must be served upon parties and not their attorneys.

This court can judicially notice the fact that the holding of the Court of Appeals here, dismissing petitioners' motion for leave to appeal because it was "untimely," i. e., made some 90 days after service of the order appealed from upon the attorneys for the appellant, is supported by the fact that no New York court has held that there has been any such radical general change of all appellate procedure in New York. After eight years under CPLR, there is not a single case to support this baseless argument of petitioners that appealable papers must be served upon a party rather than his attorney.

It would be strange indeed if, after eight years of New York State appellate practice under CPLR, petitioner Mareno were the first attorney to discover that such a radical change in appellate practice was intended, a change which would end generations of settled procedure by which service was made on attorneys, not their clients.

The form and substance of petitioners' first "Question Presented":

> "No. 1. Was the dismissal of petitioners' motion for leave to appeal to the Court of Appeals made upon an adequate state ground which precludes review of the Appellate Division's determination of the underlying Federal questions by a writ of certiorari?"

compels the answer "Yes," and the petition should be dismissed for lack of jurisdiction.

Petitioners' second "Question Presented" reads:

> "2. Was the principle of the *New York Times* case properly applied to the evidence adduced on respondent publishers' pre-trial motion for summary judgment under the causes of action in libel?"

Judge McCullough's opinion at Special Term (Petitioners' Appendex A, pp. 25-28) shows that this question

must be answered "Yes," because of Judge McCullough's careful and informed application of the law of *New York Times* to the undisputed facts in this case.

Judge McCullough wrote at page 26 of the appendix:

> "It is the contention of the defendant newspaper that at the time the article was published no one connected therewith had any knowledge that there was anything false in the publication and did not publish with reckless disregard of truth or falsity, or in extreme departure of responsible publishing procedures. This court agrees with the contention of the defendant newspaper that, by the standards set forth in the *New York Times v. Sullivan* (376 U. S. 254, 11 L. Ed. 2d 686), and the companion cases of *Curtis Publishing Co. v. Butts*, and *Associated Press v. Walker* (388 U. S. 130, 18 L. Ed. 2d 1094), the statements contained in the article are not actionable as against the defendant newspaper."

The court closed its opinion (p. 28, Petitioners' Appendix) by quoting from *New York Times v. Sullivan* (376 U. S. 254, 270), the excerpt which the court in that case took from Mr. Justice Brandeis:

> "Those who won our independence believed • • • that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the

> argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Judge McCullough's holding is a clear decision, after consideration of all of the materials advanced by both parties, pleadings, affidavits and discovery material, that plaintiffs (petitioners) had utterly failed to show that, at the time of the publication, respondent publisher had any knowledge of falsity in the publication, and that the publication was not made with any reckless disregard of truth or falsity.

Petitioners do not even discuss the Special Term holding in this respect. Instead, they try to erect a sham argument upon alleged inconsistencies between the discovery and affidavit statements of respondent Margles and the matter published (Petitioners' Brief, pp. 6-8). There is no reality to these claimed inconsistencies.

However, even accepting this baseless hypothesis of inconsistencies between what respondent Margles said and what was published, the answer is that the court found it to be the fact that, at the time of the publication, the respondent publisher had no knowledge of falsity in the publication, and there was no reckless disregard of truth or falsity. This was the heart of this case below, and nowhere in their petition do petitioners address themselves to this essential issue.

A mere reading of the claimed libelous publication (pp. 4 and 5 of petition) discloses that there is no charge of crime, no charge of any disgraceful act or any act which would bring petitioners into public disgrace, but merely statements that petitioners' litigation was "legal harassment of the worse kind" and "motivated by the basest political motivation and is merely an attempt to embarrass Mr. Kibbe and the Town Board" and the ex-

pression of the town attorney's opinion that the action was a "contemptible action" which would "cause the Town to turn on them with revulsion."

How could one prove the objective meaning or the truth or falsity of "legal harassment of the worse kind," or of "basest political motivation," or of the completely subjective statement, "I feel that this case will cause the Town to turn on them with revulsion"?

These are not objective charges of wrongdoing; they are merely emotional expressions of purely subjective opinion.

When Special Term granted summary judgment against petitioners, it was well justified in writing of petitioners' taxpayers' action, "Once the plaintiffs had undertaken to put themselves in this position, it follows logically that they should have expected criticism from those persons who did not agree with their position" (p. 27, appendix to Petitioners' Brief).

At page 13 of petitioners' brief, we find:

> "The pre-trial dismissal of the instant action at Special Term resulted in the total denial to Petitioners of their day in court devoid of any meaningful application of the constitutional malice test enunciated by this court in *New York Times v. Sullivan*, 376 U. S. 254. In the case of the libel causes of action, the malice test was plainly misapplied."

After making this statement, petitioners never even state the *New York Times* malice test, *i. e.*, actual knowledge of falsity or reckless disregard of truth or falsity; never point out the fact that Special Term cited that case, quoted from it, and found that plaintiffs had failed to meet the burden of the *Times* test.

At page 2, petitioners state:

> "Question 2. involves the first amendment freedom of the press guarantee in the Constitution of the United States as applied to the states through the fourteenth amendment to the same constitution."

Here, they refer to their suppressed argument, never made completely explicit, that respondent Westchester Rockland Newspapers, Inc., after publishing the greater part of petitioners' first letter, dated June 24, 1965, did not publish petitioner Mareno's second letter to it.

We must note here that this letter of July 27, 1965, which petitioner Antonio Mareno sent respondent publisher but which was not published, says at the beginning of its second paragraph:

> "But I will not lend dignity to the offensive statements by repeating them or replying to them. Neither will I discuss the merits of the lawsuit."

It is difficult indeed to understand how petitioner Mareno can insist that respondent was under the duty of publishing his letter in which he stated that it was not a reply to alleged "offensive statements."

How can a duty to publish a non-reply arise?

It is clear, of course, that the duty of a publisher (if any) to publish a controversial letter of a reader was no part of the problem discussed in *New York Times v. Sullivan*. *New York Times v. Sullivan* discussed no such legal duty.

Again at page 11, petitioners write:

> "Further, when Respondent publisher undertook for the first time on appeal to impugn my argument, the evidence at Special Term on the subject of the gagging of Petitioners. Petitioners endeavored in their motion for reargument of the

> appeal to place before the Appellate Division the documentation (App. E) underlying this evidence, pursuant to the court's power to make new findings of fact under CPLR 5501 (C)."

Petitioners have utterly failed to show how an alleged failure by a publisher, charged with a libel, to publish a letter in which petitioner Mareno writes that it is not a reply to the libel, can have any relevance under petitioners' second question, which relates solely to the principles of law laid down in *New York Times v. Sullivan*.

Conclusion.

The petition for certiorari should be denied for lack of jurisdiction because:

a. It does not seek review of any

> "final judgments or decrees rendered by the highest court of a state in which a decision could be had, * * *."
>
> (Title 28, Section 1257 U. S. C.)

b. Here, petitioners have shown no "title, right, privilege or immunity" which "is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States" (Title 28, Section 1257, subdivision 3, U. S. C.).

c. Summary judgment in the libel action in favor of respondent Westchester Rockland Newspapers, Inc., was properly granted at Special Term and unanimously affirmed by the Appellate Division of New York State Supreme Court under *New York Times v. Sullivan*, 376 U. S. 254, because of petitioners' failure to make any showing that the publication

was made with actual notice of falsity or in reckless disregard of truth or falsity.

November , 1971.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-479.

KATHLENE C. MARENO and ANTONIO MARENO,
Petitioners,

vs.

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,
Respondents.

Brief of Respondent, Raymond Margles, in Opposition to Petition for Certiorari.

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IN THE

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vs.

WESTCHESTER ROCKLAND NEWSPAPERS, Inc., and RAYMOND MARGLES,

Respondents.

Brief of Respondent, Raymond Margles, in Opposition to Petition for Certiorari.

Petitioners pray for certiorari to the Appellate Division of the New York Supreme Court to review its unanimous affirmance of a Special Term summary judgment in favor of respondent Margles who was the defendant in two causes of action in slander brought by petitioners.

POINT I.

Petitioners have no jurisdictional foundation for a writ of certiorari.

Title 28 U. S. C. §1257 gives this court jurisdiction to review by certiorari final judgments and decrees rendered by the highest court of the state in which a decision could be had where any title, right, privilege or

immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under the United States. Petitioners have failed to bring themselves within this jurisdictional statute.

Since here New York's highest court dismissed petitioners' motion for leave to appeal to it from the unanimous affirmance of the Appellate Division as untimely in this case, there is no judgment or decree of the highest court of any state in which a decision could be had, and thus no jurisdiction for issuance of the writ sought.

If petitioners had made a timely motion for leave to appeal, which had been denied, then they would have had a decision of the highest court of the state, but, by their failure to move in time, they did not obtain a judgment reviewable by certiorari under Title 28, §1257 U. S. C.

On this point, this respondent rests on the brief of respondent Westchester Rockland Newspapers, Inc.

POINT II.

Petitioners endeavor to convert questions of state slander law and procedure into federal questions.

The Judge at Special Term wrote:

> "There is absolutely no indication that there was any deliberate malice on the part of defendant Margles, and the statements complained of appear to be merely the spontaneous remark of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit. The plaintiff has not alleged any special damage and this court cannot conceive that the utterances complained of have in any way damaged him in the

practice of his profession (*Gilber v. Gioffi*, 21 A. D. 2d 517, and cases cited therein)."

(Decision of Spec. Term, p. , Petitioners' Brief.)

This holding was unanimously affirmed by the Appellate Division of the Supreme Court.

This presents no federal question but a clear question of state slander law.

"Province of Court and Jury—

"105. Province of Court. Whether words spoken are slanderous per se, provided their meaning is clear, is a question of law for the court.

"*Edwards X-ray Co. v. Ritter Dental Mfg. Co.*, 124 Misc. 898, 210 S. 299; *Woodruff v. Woodruff*, 36 Misc. 15, 72 S. 39; *McKinley v. Rob*, 20 John 351; *Liddle v. Hodges*, 15 N. Y. Super. Ct. 537; *Mishkin v. Roreck*, 202 Misc. 653, 115 S. 269; *Surdi v. Dallman*, 185 S. (2) 988."

(The Law of Libel & Slander in The State of N. Y., Seelman, 2nd Ed., Vol. 2, p. 1058 ¶105.)

The New York Civil Procedure Law and Rules provide for a motion for summary judgment in R. 3212. Subdivision (b) thereof, entitled "Supporting Proof; grounds: relief to either party," provides:

"If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

In this case, respondent Westchester Rockland Newspapers, Inc., charged with libel because it published quotations of statements by respondent Margles, moved for summary judgment against petitioners, plaintiffs below. Special Term granted this motion. After granting summary judgment for respondent publisher on libel

causes (the first and third causes in the complaint), the court wrote:

> "By the same token, the court is of the opinion that the second and fourth causes of action should also fail. There is absolutely no indication that there was any deliberate malice on the part of the defendant Margles, and the statements complained of appear to be merely the spontaneous remarks of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit. The plaintiff has not alleged any special damage and this court cannot conceive that the utterances complained of have in any way damaged him in the practice of his profession (*Gilber v. Gioffi*, 21 A. D. 2d 517, and cases cited therein)."

Mere examination of the claimed slanders discloses that the language pleaded was not slanderous. It charges no crime, it does not hold anyone up to public vilification or disgrace, it causes no public avoidance, it charges no disgraceful disease, and it does not reflect on anyone's occupation or profession. The court found that there was no deliberate malice by respondent Margles, and that "the statements complained of appear to be merely the spontaneous remarks of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit" (Special Term decision).

This is a clear case for application of subdivision (d) of R. 3212 in a case where one defendant had moved for summary judgment and defendant Margles, a party "other than the moving party is entitled to a summary judgment." The statute provides that in such a case the court "may grant such judgment without the necessity of cross-motion" (R. 3212), which is exactly what the court did, and what petitioners complain about.

There is and can be no claim of federal constitutional defect in the statute, lack of due process, or lack of equal protection of the law, or of any other federal question here.

This is a clear case in which petitioners (plaintiffs below) were called upon to resist a motion for summary judgment in libel cases that were founded upon publications of respondent Margles' oral statements upon which petitioners also asserted independent causes of action in slander against respondent Margles.

When the court found the libel actions based on publication of the oral statements insufficient, it almost necessarily proceeded to examine respondent Margles' oral statements which petitioners claimed were slanderous. It found them insufficient on their face to constitute slanders, a finding compelled by mere inspection of the claimed slanders.

Language which is non-libelous is *ipso facto* non-slanderous.

Five justices of the Appellate Division unanimously affirmed, and petitioners moved in the Court of Appeals months after their time expired for permission to appeal. The Court of Appeals dismissed their untimely motion.

Conclusion.

The petitioner should be denied:

(a) because no decision of the highest court of a state in which a decision could be obtained is involved here and thus there is no jurisdiction for certiorari under Title 28, §1257.

(b) because petitioners set up no title, right, privilege or immunity claimed under federal law but mere baseless claims of error under state slander law and state procedure.

Dated: Stony Point, New York,
November , 1971.

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